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Sprint.

AT&T

Suite 1000
120 20th Street, NW
Washington DC 20036
202-457-2023
FAX 202-263-2616

October 1, 2002

EX PARTE

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12 Street, S.W., TW-A325
Washington, DC 20554

Re: Response to APCC's *Ex Parte* Letters Of September 5, 2002 and September 11, 2002; Implementation of the Pay Telephone and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Ms. Dortch:

AT&T Corp., Sprint Corporation, and WorldCom, Inc. respectfully submit this *ex parte* response to arguments raised by the American Public Communications Council ("APCC"), particularly APCC's September 5, 2002 and September 11, 2002 *ex parte* submissions in this docket.[1]

Notwithstanding the litany of lengthy *ex parte* letters that have been submitted by APCC on behalf of its members, including APCC's two most-recent letters, the following remains undisputed. As the D.C. Circuit has explained, Section 276(b)(1) requires the Commission to "'take all actions necessary'" to "ensure fair compensation" for payphone calls. *MCI Telecommunications Corp.* v. *FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998) ("*MCI Remand Decision*") (quoting 47 U.S.C. § 276(b)(1)(A)). For the period October 7, 1997 through April 21, 1999 (the

[1] *See* Letter from Robert N. Felgar to Marlene H. Dortch dated Sept. 11, 2002, "Re: Impact of IXC Bankruptcies on a True-Up: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128" ("APCC Sept. 11 Ex Parte"); Letter from Robert N. Felgar to Marlene H. Dortch dated Sept. 5, 2002, "Re: Response to IXC Refund *Ex Parte* of July 2, 2002; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128" ("APCC Sept. 5 Ex Parte").

"Intermediate Period"), IXCs compensated payphone service providers ("PSPs") at a rate of $0.284 per completed call. The $0.284 rate was challenged immediately and was invalidated by the D.C. Circuit. As a result, the Commission has determined, and the D.C. Circuit has affirmed, that the "fair" rate of compensation for the Intermediate Period was significantly lower, namely, $0.238 per completed call. *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 2545, ¶¶ 118, 196 (1999) ("*Third Report & Order*"), *aff'd*, *American Public Communications Council* v. *FCC*, 215 F.3d 51 (D.C. Cir. 2000). Further, PSPs were (or should have been) aware that the Commission's original $0.284 rate per completed call for the Intermediate Period was under challenge and that payments made pursuant to the Commission's order were subject to refund; indeed, in the *MCI Remand Decision*, the Court refrained from vacating the $0.284 rate only because the Commission was authorized to grant refunds if it determined – as it did – that a lower rate was "fair." *MCI Remand Decision*, 143 F.3d at 609. The Commission, in turn, was fully aware of these facts when it concluded that PSPs were required to return the overpayments they received for the Intermediate Period. *Third Report & Order*, ¶ 196. That ruling clearly was mandated by controlling law and should not be disturbed. *See, e.g.*, *Exxon Co.* v. *FERC*, 182 F.3d 30, 49-50 (D.C. Cir. 1999); *Public Serv. Co.* v. *FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996).

APCC's *ex parte* submissions do not undermine these facts and are instead an invitation to reversible error. First, APCC's position that refunds should be denied for the Intermediate Period cannot be reconciled with Section 276 or the D.C. Circuit's *MCI Remand Decision*, both of which dictate that the Commission was obligated to order refunds under these circumstances. Second, APCC's legally erroneous and factually baseless claims that PSPs were undercompensated for the Early Period (June 1, 1992 – November 6, 1996), have no bearing on the propriety of refunds for the Intermediate Period and, in all events, are based upon numerous unsupportable factual assumptions. Third, APCC's claim that carriers such as AT&T, Sprint and WorldCom already have been fairly compensated for the Intermediate Period is simply false. Finally, APCC's speculation regarding the impact of recent bankruptcy proceedings of certain IXCs does not support its request that PSPs be permitted to keep overpayments made to them by *all* IXCs.

I. APCC'S ARGUMENT THAT PSPS ARE ENTITLED TO RETAIN OVERPAYMENTS MADE TO THEM FOR THE INTERMEDIATE PERIOD IS CONTRARY TO SECTION 276 AND THE *MCI REMAND DECISION*.

In their July 2, 2002 Ex Parte, AT&T, Sprint, and WorldCom showed that the Commission's determination that true-up payments were appropriate for the Intermediate Period was mandated by Section 276 and the *MCI Remand Decision*. *See* IXC July 2, 2002 Ex Parte at 2-5. Notwithstanding that showing, APCC now argues that "it would violate controlling precedent to order a true up." APCC Sept. 5 Ex Parte at 1. That argument is wrong. In the *MCI Remand Decision*, the D.C. Circuit held:

> We choose not to vacate the $.284 rate on the clear understanding that if and when on remand the Commission establishes some different rate of fair compensation for coinless payphone calls, the Commission may order payphone service providers to

> refund to their customers any excess charges for coinless calls collected pursuant to the current rate.

MCI Remand Decision, 143 F.3d at 609. APCC nowhere addresses this core holding by the D.C. Circuit. Indeed, the *MCI Remand Decision* makes clear not only that a refund is *permitted*, but also that Section 276(b)(1) "requires the Commission to 'take all actions necessary'" to "ensure fair compensation of payphone service providers." *Id.*

The Commission, in turn, has concluded that its $0.284 rate per completed call was not "fair," and that the rate of $0.238 per completed call "is fair to all parties involved." *Third Report & Order*, ¶ 118. APCC wrongly argues that the Commission took "no consideration whatever of the equities of ordering refunds." APCC Sept. 5 Letter at 4. The *Third Report & Order* makes clear, however, that the Commission expressly considered the impact of refunds on PSPs and IXCs when it decided to award refunds and formulated the manner in which refunds should be returned. *Id.* ¶¶ 196, 198 (designing refund mechanism to avoid harm if PSPs "are required to immediately refund substantial overpayment amounts to the IXCs").

As a result, the Commission has properly concluded that IXCs are entitled to recover the overpayments that they made for the Intermediate Period. That conclusion undoubtedly is correct under the *MCI Remand Decision* and Section 276. Thus, contrary to APCC's assertions, the Commission cannot, on the one hand, find that the $0.238 rate is "fair," and, on the other hand, allow PSPs to retain IXCs overpayments made during the Intermediate Period based upon a significantly higher rate.

II. ARGUMENTS REGARDING THE EARLY PERIOD ARE IRRELEVANT TO THE ISSUE OF REFUNDS FOR THE INTERMEDIATE PERIOD.

Previously, in their July 2, 2002 IXC *ex parte*, AT&T, Sprint and WorldCom showed that the Early Period was irrelevant to whether refunds are mandated by Section 276 and the *MCI Remand Decision* because (i) that period was governed by an entirely separate statutory scheme, (ii) APCC failed to seek additional compensation for the Early Period when this issue was presented to the Commission, and (iii) APCC failed to appeal the Commission's determination that no additional compensation was warranted for the Early Period. Although APCC claims that it does not seek refunds for the Early Period, APCC nevertheless insists that the Early Period remains relevant to whether the Commission should reconsider its decision to order refunds of overpayments for the Intermediate Period. That argument should be rejected.

A. APCC's Arguments Regarding The Early Period Are Legally Irrelevant To The Issue Of Refunds Under Section 276.

APCC does not dispute that PSPs abandoned any claim to additional compensation for the Early Period when that issue was presented (and rejected by the Commission) years ago. Although APCC admits that PSPs have no "legal" right to additional compensation for the Early Period, it insists that the Early Period remains relevant to the "equitable relief" that PSPs seeks. At bottom, APCC seeks to avoid the requirements of Section 276, the *MCI Remand Decision* and the *Third Report & Order* through an improper collateral attack on the Commission's determination that PSPs were entitled to no additional compensation for the Early Period.

First, the compensation received by PSPs for the Early Period is irrelevant to the issue of whether the Commission properly ordered refunds under Section 276 for the Intermediate Period. The Commission has concluded, as a matter of federal policy, that Section 276 *does not* apply retroactively to the Early Period. *First Report & Order*, ¶ 126. But even if the Early Period could be deemed relevant, the Commission has conclusively determined that no additional Early Period compensation was due to PSPs. Incredibly, APCC now argues that "the Commission made no determination as to whether additional compensation for the Early Period was warranted." Ex Parte at 5. APCC's submissions confirm that this argument is wrong.

On remand from the D.C. Circuit's decision in *Florida Public Telecommunications Ass'n* v. *FCC*, 54 F.3d 857 (D.C. Cir. 1995) ("*FTPA*"), the Commission expressly folded the *FTPA* remand into its proceeding to implement § 276 of the Telecommunications Act of 1996. *See In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd. 6716, ¶¶ 12 n.42, 88 (1996). APCC's comments make clear that APCC understood that claims for additional Early Period compensation would be resolved in conjunction with the Commission's implementation of § 276 of the 1996 Act. APCC requested only

> that the Commission take a modest step to recognize independent PSPs' entitlement to compensation under *FTPA* by making the interim compensation in this proceeding retroactive to at least to the Public Notice initiating this proceeding [*i.e.*, June 6, 1996].

In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Petition of the Colorado Payphone Ass'n for Partial Reconsideration, at 21-22 (Apr. 21, 1999) (quoting APCC's comments). Thus, in 1996, APCC expressly recognized that the remand from the *FTPA* remand would be resolved in the Commission's proceeding implementing § 276 of the 1996, but APCC chose to make no serious claim for additional Early Period compensation. Not surprisingly, the Commission rejected APCC's "modest" request to make the compensation retroactive to June 6, 1996, specifically declining to apply its ruling back "to the date of release of the Notice." *Report & Order* ¶ 126. The Commission therefore made clear that PSPs would receive *no* additional Early Period compensation. To the extent that APCC disagreed with that result, it should have raised that issue on appeal.

After abandoning that issue, APCC cannot now, more than half a decade later, relitigate whether the Commission was "right" in concluding that no additional Early Period compensation was warranted. APCC makes no effort to address the rule that "where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument" in later proceedings. *E.g.*, *Northwestern Indiana Tel. Co.* v. *FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989). Nor can APCC avoid this result by arguing that it seeks equitable relief. No principle of equity gives a party license to relitigate claims that that were knowingly abandoned in a prior proceeding. Indeed, the rule that a party may not relitigate claims that were or could have been raised previously, applies equally to claims grounded in "equity." *E.g.*, *Restatement of the Law, Restitution* § 146, at 585-86 (1938) (explaining that party is entitled to "only one determination of a controversy" and "is precluded from asking for a determination upon any issue which he should have raised" previously). That is especially true where, as here, the relief sought by APCC would, in essence, constitute a retroactive revision of the rates for the Early Period in violation of controlling precedent. *Verizon Tel. Cos.* v. *FCC*, 269 F.3d 1098, 1107-08 (D.C. Cir. 2001); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002). Further, an erroneous legal argument does not provide an equitable basis for denying refunds. *See Exxon*, 182 F.3d at 49 (holding that reliance upon filed-tariff doctrine did not justify refusal to award refunds).

Second, APCC's argument that "the Commission should not order a true-up for the Intermediate Period" because the Commission refused to order additional compensation for the Early Period is meritless. APCC's Sept. 5 Ex Parte at 6. As to the Early Period, the Commission concluded that the governing statute did not require additional compensation to PSPs, and that ruling went unchallenged on appeal. In contrast, here, (i) the D.C. Circuit has ruled that Section 276 *requires* the Commission to "ensure fair compensation,"[2] (ii) the Commission's $0.284 per call rate was challenged, successfully, on appeal, and, (iii) on remand, the Commission determined that the "fair" rate of compensation during the Intermediate Period is $0.238 per completed call. All the while, PSPs have been aware that the Commission's $0.284 rate has been subject to unceasing and successful challenge and therefore PSPs could have no "detrimental and reasonable reliance" upon the funds they collected under that higher rate. *See Public Serv. Co.* v. *FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) (explaining that reliance on challenged rate "would have been foolhardy").

B. APCC's "Conservative" Assumptions Regarding The Early Period Are Unsupportable.

In connection with its arguments regarding Early Period, APCC argues, erroneously, that "IXCs do not challenge the accuracy of [APCC's] assumptions, demonstrate the manner in which the assumptions are flawed, or proffer a different calculation of Early Period underpayments." APCC Sept. 5 Ex Parte at 3. In assessing the credibility of APCC's purportedly "conservative" estimates, it is important to underscore that APCC currently contends that, under these assumptions, PSPs were undercompensated by $82 million (or $135 million when interest is added). But, when the issue actually was resolved by the Commission, APCC never challenged the determination that PSPs were entitled to *no* additional Early Period compensation. As shown below, APCC's assumptions are unreasonable.

First, the most important assumption that APCC makes is that it was entitled to *any* additional compensation for 800-subscriber calls made during the Early Period. But the Commission rejected APCC's request for additional Early Period compensation, and there is no dispute that APCC never challenged that determination on appeal. As a result, the only truly relevant assumption here – that PSPs were entitled to additional compensation for the Early Period – is demonstrably false.

[2] 47 U.S.C. § 226(e)(2) (stating that the Commission shall *consider* the need to prescribe compensation . . . for owners of competitive public pay telephones . . . .") (emphasis added).

Second, APCC's assumptions unreasonably exaggerate the number of calls for which APCC claims PSPs should have been compensated. APCC argues that, at the beginning of the Early Period in 1992, "the average number of interstate access code calls originating from payphones was 15 calls per payphone per month" and "the average number of interstate subscriber 800 calls . . . was roughly 30" for a total of "approximately 45 calls per payphone per month." APCC's April 15 Ex Parte at 6. But when the issue of payphone compensation was before the Commission in 1992, APCC provided very different numbers. Back then, the Commission noted that

> APCC claims that each competitively provided payphone originates, on average, *thirty interstate non-coin calls per month*, about half of which after unblocking will be *access code calls.*

Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 7 FCC Rcd. 3251, ¶ 33 n.56 (1992) (emphasis added). Thus, in 1992, APCC claimed that there would be a total of 30 interstate non-coin calls per month, of which "about half" were not access code calls. In other words, APCC's current estimate doubles the number of subscriber-800 calls (now 30) from the number that it provided to the FCC 10 years ago (then 15).

Moreover, APCC has inflated the number of calls for the Early Period by now assuming that "the ratio of subscriber 800 calls to access code calls" is 2:1. APCC's April 15 Ex Parte at 6. The assumption that there were twice as many subscriber-800 calls than access code calls is critical to APCC's claim of undercompensation because, under APCC's current methodology, PSPs were more than adequately compensated for access-code calls (according to APCC, at a rate of approximately $0.40 per access-code call); whereas APCC claims that it was undercompensated for subscriber-800 calls. But in 1992, APCC claimed that the ratio of subscriber-800 calls to access code calls was 1 to 1. *See* 7 FCC Rcd. 3251, ¶ 33 n.56. Now, 10 years later, to support its claim of undercompensation, APCC doubles its estimate of the number of subscriber-800 calls from 15 to 30 calls per payphone per month. If APCC's arguments were accepted – and they should not be – that would cause the number of interstate subscriber-800 calls for the Early Period to be grossly overestimated.

Third, APCC's estimates are further inflated because APCC assumes that PSPs would have been entitled to additional compensation for *all* interstate subscriber-800 calls. But that "conservative" assumption is contrary to the language of Section 226(e)(2). In *Florida Public Telecommunications Ass'n* v. *FCC*, 54 F.3d 857 (D.C. Cir. 1995), the Court ruled that the Commission could "'consider the need to prescribe compensation' for subscriber-800 calls 'routed to providers of operator services *that are other than the presubscribed provider of operator services*.'" *Id.* 862 (quoting Section 226(e)(2)) (emphasis added). Thus, Section 226(e)(2) required only that the Commission consider prescribing compensation for the *subset* of interstate subscriber-800 calls that were "routed to providers of operator services that are *other than the presubscribed provider of operator services for such telephone*." That is, if a subscriber-800 call were routed, for example, through AT&T, and AT&T was the "presubscribed provider of operator services for such telephone," then the Commission would lack authority under Section 226 even to consider whether compensation should be prescribed under Section 226. APCC's "conservative" assumptions ignore this statutory limit on the Commission's authority to consider whether to prescribe compensation for subscriber-800 calls.

Finally, APCC argues that the level of compensation to which it was entitled during the Early Period would have grown each quarter. Specifically, APCC assumes that the number of calls for which it was entitled to compensation would have increased from "45 calls per payphone [per] month" at the beginning of the Early Period to "74 calls per payphone [per] month" at the end of the Early Period. APCC's April 15 Ex Parte at 6. In APCC's view, PSPs were entitled to an increase in the per-payphone compensation for each quarter of the Early Period based upon revised estimates of call volume. Even assuming that APCC's growth estimates were properly supported – and they are not – the compensation scheme that APCC seeks retroactively to apply is irreconcilable with the compensation scheme actually adopted by the Commission (wholly apart from any consideration of subscriber-800 calls).

As APCC acknowledges, the compensation scheme that the Commission adopted to implement Section 226 did not provide PSPs with increased compensation based upon quarterly revisions in payphone call volume; rather, the prescribed rate "for most of the Early Period was $6.00 per payphone per month." APCC's April 15 Ex Parte at 7 & n.9. As the Commission explained, this flat rate was appropriate because "no entity currently has the ability to determine accurately the number of access code calls that originate from each competitive payphone." 7 FCC Rcd. at 3253, ¶ 13. As a result, APCC's claim of Early Period undercompensation is grossly exaggerated because APCC assumes not only that the Commission should have provided additional compensation for subscriber-800 calls, but also that the Commission would have adopted, retroactively, an entirely different payphone compensation system than the one actually adopted.[3]

III. REFUNDS ARE WARRANTED BECAUSE IXCs WERE NOT ADEQUATELY COMPENSATED FOR THE INTERIM AND INTERMEDIATE PERIODS.

APCC also suggests that refunds for the Intermediate Period should be denied because IXCs already have recovered "the full amount of the compensation payments for which they now seek refunds." Sept. 5 Ex Parte at 1. But that argument is false.

As AT&T, Sprint and WorldCom each demonstrated previously, IXCs compensated PSPs for completed payphone calls during the Intermediate Period regardless of whether they were able to collect these charges from payphone end users.

[3] APCC argues, in passing, that PSPs were undercompensated for the Intermediate Period. APCC Sept. 5 Ex Parte at 1-2. APCC claims that "the actual call volumes per payphone *for which compensation was collected during the Intermediate Period* are far lower than the estimated call volumes on which the $0.238 rate was based." APCC's April 15 Ex Parte at 7 (emphasis added). But this argument is indistinguishable from APCC's prior claim that "bad debt" warranted an adjustment to the $0.238 per call rate for the Intermediate Period. *Third Report & Order* ¶ 162. The Commission's rejection of that argument was affirmed by the D.C. Circuit, *APCC* v. *FCC*, 215 F.3d 51 (D.C. Cir. 2000), which explained, among other things, that "the nature of the debt involved" would permit disappointed parties to seek damages, fines and penalties under the Commission's complaint procedures, *id.* at 55-56. APCC's rehash of its "bad debt" arguments provides no basis for reconsideration. *See Regulatory Policy Regarding Direct Broadcast Satellite Service*, 94 FCC 2d 741, ¶ 11 (1983).

In fact, these IXCs substantially *underrecovered* from end users because they were unable to recover surcharges for a significant percentage of the payphone compensation they paid. *See* AT&T's Aug. 23, 2002 Ex Parte at 2; Sprint's Sept. 5, 2002 Ex Parte at 1; Sprint's Sept. 27, 2002 Ex Parte at 1-2; and WorldCom's Sept. 17, 2002 Ex Parte, Attachment at 4; WorldCom's Sept. 19, 2002 Ex Parte, Attachment at 4. Indeed, even if these IXCs received true-up payments for the Intermediate Period, AT&T alone would remain undercompensated by almost $150 million for the Intermediate Period. *See* AT&T's August 23, 2002 Ex Parte at 2. Specifically, AT&T was unable to recover virtually any payments from about 40% of all payphones because AT&T did not receive the necessary FlexANI coding digits that would enable calls made from these phones to be identified as payphone calls. As a result, for a significant number of the payphone calls made during the Intermediate Period, AT&T recovered none of the $0.284 per call charge that it paid PSPs.[4] WorldCom and Sprint recovered nothing for the Interim Period and also were unable to surcharge end users for calls from a substantial number of payphones during the Intermediate Period, even after FlexANI was implemented. IXCs have also underrecovered from resellers. WorldCom alone has paid $18 million in surrogate payments for which it has been unable to surcharge its reseller customers. Thus, APCC's suggestion that IXCs "have already recovered the costs of dial-around compensation from end users" is clearly erroneous, and, the true-up mandated by the Commission's *Third Report & Order* would by no means "leave IXCs overcompensated." APCC Sept. 5th Ex Parte at 7.

As a result, APCC's efforts to distinguish *Exxon Co.* v. *FERC*, 182 F.3d 30 (D.C. Cir. 1990), are wholly unpersuasive. As APCC acknowledges, *Exxon* holds that "'[t]here is a strong equitable presumption in favor of retroactivity that would make the parties whole.'" APCC Sept. 5 Ex Parte at 6 (quoting *Exxon*). Here, the Commission erroneously adopted a $0.284 rate per completed call, which carriers successfully challenged on appeal, and which the Commission corrected upon remand. But for the Commission's error, AT&T would have paid PSPs $0.238 per completed call, rather than $0.284 per completed call. By requiring PSPs to refund the difference, the Commission properly would put the "parties in the position that they would have been had the error not been made." *Exxon*, 182 F.3d at 49 (internal quotation marks omitted). Indeed, as the *Exxon* Court explained, the award of refunds under these circumstances is appropriate because it provides a proper "incentive" for "parties to litigate regarding past errors and for the agency to correct those errors." *Id.*[5]

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[4] The underlying data supporting AT&T's showing of undercompensation are being submitted today, in a separate letter, which requests the same confidential treatment for AT&T's data that the Commission has accorded to the data submitted by APCC, SBC Telecommunications, Inc. and Qwest in this docket. *E.g.*, *Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, DA 02-725, Protective Order (rel. Mar. 28, 2002) (protective order governing SBC's data).

[5] The analysis in *Exxon* does not make "retroactive compensation particularly appropriate for the Early Period." APCC Sept. 5 Ex Parte at 6. As to the Early Period, APCC did not challenge the Commission's refusal to award any additional Early Period compensation; *Exxon* does not support refunds where a party declines to appeal an adverse agency decision.

Similarly, APCC's claim that the payphone industry would be "economically endangered" by refunds ordered for the Intermediate Period should be rejected. APCC April 15 Ex Parte at 11-12. As AT&T explained in its August 23d Ex Parte Letter, in the *Third Report &* Order, the Commission already addressed those concerns by developing a refund schedule designed to avoid any legitimate claims of harm by PSPs. *Third Report & Order*, ¶ 198. The Commission's prior consideration and rejection of APCC's argument precludes reconsideration of that issue now. *See Direct Satellite*, 94 FCC 2d 741, ¶ 11 ("Petitions for reconsideration are not granted for the purpose of debating matters which have already been fully considered and substantively settled"). Further, implicit in APCC's argument is that PSPs have reasonably and justifiably relied upon these overpayments and therefore are entitled to keep them. But that contention is contrary to controlling precedent, which holds that once the lawfulness of an agency's rate "was in dispute, we do not see how the Commission could possibly find that [parties receiving that rate] reasonably relied upon continuing to recover it." *Public Serv. Co.*, 91 F.3d at 1490; *see Exxon*, 182 F.3d at 49 (same).

IV. ARGUMENTS REGARDING RECENT IXC BANKRUPTCY PROCEEDINGS ARE IRRELEVANT TO INTERMEDIATE PERIOD REFUNDS.

The recent bankruptcy proceedings involving WorldCom and Global Crossing should have no bearing upon the Commission's 1999 decision in the *Third Report & Order* to order refunds for the Intermediate Period (and Interim Period).[6] Nevertheless, APCC contends that "the Commission *must consider* the effect of this changed circumstance (WorldCom and Global Crossing bankruptcies) in any decision it makes regarding whether and how to order a true-up." APCC Sept. 11 Ex Parte at 3. APCC argues that, independent PSPs will be undercompensated by $14 million as a result of these bankruptcies because neither WorldCom nor Global Crossing will make any payment toward under-payments associated with the Interim Period, yet they will receive refunds for over-payments made during the Intermediate Period. These arguments should be rejected.[7]

First, none of these arguments is relevant to AT&T or Sprint, which are not in bankruptcy, and particularly AT&T, which has *overcompensated* PSPs for *both* the Interim and Intermediate Periods. Significantly, the D.C. Circuit already has made clear that Section 276 does not authorize the Commission to require some IXCs to bear costs associated with other IXCs. *Illinois Pub. Telecommunications Ass'n* v. *FCC*, 117

[6] APCC's September 11, 2002 Ex Parte states that the Commission's refund order requires PSPs to "refund compensation to IXCs to correct for the difference between the $0.284 rate initially set for that period and the $0.24 rate subsequently found to be a 'fair' rate." *Id.* at 2. In fact, the Commission concluded the appropriate rate for the Intermediate Period was $0.238 per completed call. *Third Report & Order*, ¶ 196.

[7] Significantly, APCC's estimate of the impact of bankruptcies has evolved in a very short period of time. On page four of its September 11, 2002 Ex Parte, APCC estimates that it would lose $14 million as a result of WorldCom's and Global Crossing's bankruptcies. In its recent September 19, 2002 Ex Parte submitted for its meeting with Jordan Goldstein, APCC has estimated that it would lose $30 million due to bankruptcies.

F.3d 555 (D.C. Cir. 1997). In *Illinois Public Telecomm.*, the D.C. Circuit reversed the Commission's decision to "exempt[] all but large IXCs from paying the costs of services received." *Id.* Thus, the Commission cannot compel one carrier to pay the payphone compensation obligations of another. *See id.* But that is precisely what APCC proposes here, *i.e.*, that AT&T and Sprint be required to pay more than what the Commission has concluded to be "fair" to make up for a shortfall that APCC predicts will occur as a result of recent IXC bankruptcies. IXCs such as AT&T and Sprint, however, are not the guarantors of the PSP industry.

Second, APCC argues, erroneously, that the "bankruptcies of WorldCom and Global Crossing *guarantee* that such refunds would leave independent PSPs massively undercompensated for dial-around calls for both the Intermediate Period and Interim Period." APCC Sept. 11 Ex Parte at 1. But that assumption is false. Indeed, APCC inaccurately portrays the potential impact the WorldCom and Global Crossing bankruptcies might have on independent PSPs. The Bankruptcy Code recognizes and protects the rights of creditors like the PSPs to offset or credit claims that they have against a debtor like WorldCom against amounts they owe the debtor. Thus, WorldCom could collect only the net amount owed to it by a PSP. This truth directly contradicts APCC's assertion that PSPs will be required to compensate WorldCom for over-payments carriers made during the Intermediate Period without *any* offsetting payments from carriers for the Interim Period. *See* APCC Sept. 11 Ex Parte at 5 (arguing that "PSPs . . . would collect none of the additional compensation owed them by WorldCom and Global Crossing for the Interim Period."). In fact, WorldCom will credit refunds it is owed from overpayments made during the Intermediate Period against liabilities for underpayments associated with the Interim Period. Although it is difficult to determine the net liabilities to PSPs until the Commission issues an order determining allocation percentages for each IXC, WorldCom anticipates that while it expects to be a net payer, its credits from PSPs will nearly balance WorldCom's liabilities to PSPs.

Further, APCC mischaracterizes the impact of WorldCom's bankruptcy in the event that, after offset or credit of their respective claims, a PSP is owed money by WorldCom. APCC incorrectly presumes that none of this much *reduced* net liability will be paid. APCC Sept. 11 Ex Parte at 5. To emerge from Chapter 11, WorldCom must propose and confirm a plan that deals with every claim against it. That plan will be the product of negotiation with interested parties, including the Official Committee of Unsecured Creditors appointed in the case, which has a fiduciary responsibility to achieve as substantial recovery as possible for creditors like the PSPs. WorldCom's plan will also be voted on by the creditors and can be confirmed only if it satisfies requirements of the Bankruptcy Code that are designed to protect the interests of creditors. For example, in WorldCom's plan, creditors could receive discounted payments, an equity position in the company, or a combination of the two. At the moment it is impossible to predict the impact of WorldCom's bankruptcy on PSPs because that will depend on many factors, including the nature of the disbursements that PSPs receive (whether cash, debt and/or equity) and the market value of WorldCom when it emerges from bankruptcy and in the future. Indeed, if WorldCom does well in the future, equity positions may yield higher value than immediate payment of net liabilities. PSPs who choose this option potentially may receive higher revenues than had WorldCom not filed for Chapter 11 protection.[8] In short, APCC's assumptions and predictions regarding the impact of recent bankruptcies are fundamentally flawed.

Finally, the cases cited by APCC do not support a different result. APCC argues that *West Ohio Gas Co.* v. *Public Util. Comm'n*, 294 U.S. 79, 80-82 (1935), stands for the proposition that "[w]hen an agency prescribes a rate for a past period, it must consider actual facts that have occurred." APCC Sept. 11 Ex Parte at 7. But that principle cannot support APCC's argument here because the *Third Report & Order* was issued in 1999, and mandated refunds for the Intermediate Period well before these recent events. As a result, the Commission's order mandating refunds did not ignore "facts that have occurred." *See also Summerfield* v. *Civil Aeronautics Bd.*, 207 F.2d 200, 203 (D.C. Cir. 1953). Moreover, even now, the "facts" upon which APCC relies are erroneous predictions regarding the possible impact of these recent bankruptcy proceedings. In contrast, the Commission based its *Third Report & Order* based upon the existing facts and based upon reasonable projections which were affirmed on appeal. *See American Public Communications Council* v. *FCC*, 215 F.3d 51, 58 (2000). Indeed, what APCC proposes here is for the Commission to modify the lawful rates (which were approved on appeal) for the Intermediate Period based upon its speculation regarding the impact of wholly subsequent events; that approach is precluded by the rule against retroactive ratemaking. *E.g.*, *Verizon Tel. Cos.* v. *FCC*, 269 F.3d 1098, 1107-08 (D.C. Cir. 2001); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002).

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[8] For example, APCC's assertion that independent PSPs will not receive any payment from WorldCom is wrong. *Id.* at 4. Although the amount of the discount has yet to be negotiated, WorldCom represents that it will not be a 100 percent discount. Consequently, if the Commission were to relieve PSPs of their Intermediate Period refund obligations, believing that by doing so it would compensate PSPs for revenues foregone as a result of WorldCom's bankruptcy, PSPs would actually end up being overcompensated once WorldCom settled pre-bankruptcy claims. Of course, the overpayment to PSPs would be much larger since APCC is proposing to exempt independent PSPs from Intermediate Period payments to all carriers, not just WorldCom.

CONCLUSION

For these reasons, AT&T Corp., Sprint Corporation and WorldCom Inc. respectfully submit that the APCC's request that it be permitted to keep overpayments from IXCs for the Intermediate Period should be rejected.

Sincerely,

-FOR-

Teresa Marrero
AT&T CORP.

-FOR-

Larry Fenster
WORLDCOM INC.
1133 19th Street, NW
Washington, DC 20036
202-736-6513

-FOR-

John E. Benedict
H. Richard Juhnke
SPRINT CORPORATION
Suite 400
401 Ninth Street, NW
Washington, DC 20004